Supreme Court, U.S.
FILED

140 No. (1) 09-349 SEP 21 2009

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In the
# Supreme Court of the United States

**VICTORIA YAITSKY,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

**WHETHER THE MANDATORY WORD "SHALL" IN 28 U.S.C. § 2255(b) REQUIRES SPECIFIC FINDINGS BY A DISTRICT COURT IF THE PETITION IS DENIED WITHOUT A HEARING.**

## LIST OF PARTIES

All of the parties to the proceeding are listed in the caption.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Victoria Yaitsky respectfully request that a *writ of certiorari* issue to review the decision rendered by the Fourth Circuit Court of Appeals in this case.

## OPINION BELOW

The opinions by the Fourth Circuit Court of Appeals [A-2, A-13]. and district court [A-5]. are unpublished opinions. The court of appeals issued its opinion on June 23, 2009.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Fourth Circuit on June 23, 2009.

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate, as the Fourth Circuit is believed to have entered a decision that is in conflict with the United States Constitution, precedent of the Supreme Court, and the plain meaning of Congress's enactment.

Additionally, pursuant to 28 U.S.C. § 1254(1), which provides in relevant part that "cases in the courts of appeals may be reviewed by the Supreme Court" "by writ of certiorari," this Court has jurisdiction to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel. *Hohn v. United States*, 524 U.S. 236, 253 (1998).

## CONSTITUTIONAL PROVISIONS INVOLVED

### Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

On December 8, 2004, a federal grand jury returned a one-count indictment charging Petitioner with murder-for-hire in violation of 18 U.S.C. § 1958(a). A four-day trial concluded with a guilty verdict on June 3, 2005. On January 6, 2006, Petitioner was sentenced to a term of imprisonment of 120 months and an order of judgment was entered

on January 10, 2006. [A-17] On January 19, 2006, Petitioner filed a Notice of Appeal and an Amended Notice of Appeal. On August 30, 2006, Petitioner's conviction was affirmed by the Fourth Circuit Court of Appeals. [A-13] The conviction became final on November 28, 2006 (the last day on which she could have filed a certiorari petition with the United States Supreme Court). *See Clay v. United States*, 537 U.S. 522, 527-28 (2003). On November 21, 2007, Petitioner filed a motion to vacate, set aside, or correct conviction, judgment, and sentence pursuant to 28 U.S.C. § 2255. Petitioner's § 2255 motion was denied on August 18, 2008 without a hearing or specific findings that supported the court's denial of a hearing. An application for certificate of appealability was filed in the district court on October 14, 2008 and docketed at the Fourth Circuit on October 30, 2008. The Fourth Circuit denied the certificate of appealability on April 17, 2009. [A-2] A petition for rehearing en banc was filed on April 28, 2009 and denied on June 23, 2009 [A-27], and the mandate was entered on July 1, 2009. Petitioner now timely and respectfully requests this Honorable Court to grant her petition for writ of certiorari.

## STATEMENT REGARDING WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

Petitioner filed a petition pursuant to 28 U.S.C. § 2255 alleging various factual allegations which, if true, entitled her to relief. The petition, when read with the reply, also required credibility determinations in order to resolve factual disputes. Her petition was denied, without a hearing in the district court and without stating reasons for such. Her Application for Certificate of Appealability and

her Certificate of Appealability alleging that she should have been granted a hearing on her § 2255 petition, were also denied. The denial of a hearing on Petitioner's § 2255 motion was in violation of the plain language of 28 U.S.C. § 2255, Supreme Court precedent, and Fourth Circuit precedent, as such, her Constitutional Due Process rights were violated. Petitioner's Writ of Certiorari presents an important federal question: does 28 U.S.C. § 2255 require a hearing on a petition pursuant to 18 U.S.C. § 2255 or in the alternative, specific findings that support the conclusion that a determination can be made without a hearing?

**Statutory Interpretation**

28 U.S.C. § 2255(b) states, "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court *shall* cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (emphasis added). This Court has held that an evidentiary hearing was required in a habeas action whenever material allegations of fact are in dispute. *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (citing *Walker v. Johnston*, 312 U.S. 275, 285 (1941). Congress embodied the same requirements in § 2255 when it provided that a hearing "*shall*" be granted unless it "conclusively" appears from the "motion and the files and records of the case" that no relief is possible. (emphasis added). The statute speaks in mandatory terms, thus, a hearing is required unless the exception is found. "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise,

and the rules which are to aid doubtful meanings need no discussion." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The issue in this case is narrowly centered on the statutory language and its plain meaning.

The Fourth Circuit failed to follow the statutory standard in denying Petitioner a hearing on her § 2255 petition because, if true, her allegations were sufficient to warrant relief. The district court failed to hold a hearing or make a particular finding that the exception was found. Accordingly, she was wrongfully denied a hearing below.

In *Machibroda v. United States*, 368 U.S. 487, 494-96 (1962), the petitioner submitted an affidavit supporting his § 2255 contentions and the government submitted an affidavit contradicting petitioner. This Court held that affidavits may not be used to resolve contested factual issues unless they are supported by other evidence. *Id.*

In *Fontaine v. United States*, 411 U.S. 213, 215 (1973) the Court remanded Petitioner's § 2255 petition for an evidentiary hearing because the record did not permit the Court to "conclude with the assurance required by the statutory standard . . . that under no circumstances could the petitioner establish facts warranting relief under § 2255." In *Fontaine*, the petitioner pled guilty but in his § 2255 petition, asserted that his plea was coerced by law enforcement. *Id.* at 213-14. The district court denied a hearing finding that the petitioner acknowledged his plea was knowing and voluntary during the Rule 11 colloquy, and therefore, he could not collaterally attack his plea. *Id.* at 214. The Supreme Court held that a coerced plea is open to

collateral attack and where a petitioner offered supporting factual allegations of coercion, he was entitled to a hearing on the evidence. *Id.* at 214-15. The offer of evidence did not "conclusively show that the prisoner is entitled to no relief . . .." *Id.* at 215. Unlike *Fontaine*, Petitioner's case was resolved after a trial and there is no record wherein she made assertions contrary to her assertions in her § 2255 Petition. As such, *Fontaine* should be construed even more favorably in a case like Petitioner's where there is no hearing wherein she stated the opposite of what she alleged in her habeas petition.

Under the law of the Fourth Circuit, *unless* it is clear from the pleadings, files, and records that the prisoner is entitled to no relief, § 2255(b) makes a hearing mandatory. *Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970); *United States v. White*, 366 F.3d 291, 297 (4th Cir. 2004) ("if the parties produce evidence disputing material facts with respect to non-frivolous habeas allegations, a court must hold an evidentiary hearing to resolve those disputes"). The Fourth Circuit failed to follow the standard mandated in its published opinions in denying Petitioner a hearing on her § 2255 petition.

Where the issue is one of credibility, Fourth Circuit law makes a hearing mandatory. *Raines*, 423 F.2d at 530 ("there will remain a category of petitions, usually involving credibility, that will require an evidentiary hearing in open court."). "When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive. . . ." *Id.* The Fourth Circuit has stated, "when a movant presents a colorable Sixth Amendment claim

showing disputed facts involving inconsistencies beyond the record, a hearing is mandated." *United States v. Robinson*, 238 Fed. Appx. 954, 955 (4th Cir. 2007) (citing *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992)). In *Magini*, the court held that a district court "must hold an evidentiary hearing when the petitioner alleges facts which, if true, would entitle [him] to relief". 973 F.2d at 264. Despite the fact that Petitioner's main issue in her § 2255 petition involved credibility determinations, she was denied a hearing.

The circuit's deviation from this standard warrants this Court's review. The circuit has departed from the plain meaning of the statute, Congressional intent, and this Court's previous holdings.

Petitioner's § 2255 petition, the government's response, including trial counsel's affidavit, and the opinion of the district court indicate that Petitioner's claims are rife with "disputed facts involving inconsistencies beyond the record." The following constitute just some examples of those disputed facts. These are the most serious issues in dispute and comport with the Fourth Circuit's standards on requiring a full habeas hearing in order to present an accurate and full record for review and protect the Petitioner's Fifth and Sixth Amendment rights.

1. Petitioner asserted that trial counsel should have investigated the case and called Yakov Lindenbaum. Petitioner asserts that Lindenbaum's testimony would have been exculpatory while Petitioner's trial counsel asserts that Lindenbaum's

testimony would have been unflattering to Petitioner. Without actual testimony this conflict could not be resolved fairly.

2. Petitioner asserted that there were witnesses available to testify regarding the efforts of Petitioner's accusers to take over her business. Petitioner's trial counsel asserts that these witnesses would have depicted Petitioner as a ruthless business woman. One has no relation to the other. Being a ruthless business women does not make a person a criminal.

3. Petitioner asserted that trial counsel had information that would have allowed him to refute the testimony of Neil Tan. The government asserted counsel did not have this information.

4. Petitioner asserted that she provided trial counsel with information regarding telephone calls between herself Igor Kirstak and Smolakovs. Counsel asserted that he did not have this information.

5. As noted in the district court opinion, "Petitioner and Trial Counsel differ on why Petitioner testified in English." [A-10]. This is a factual issue that is unresolved by the record.

6. The district court concluded that counsel's failure to call an expert witness was strategic, but the record is clear that counsel had every intention of calling an expert and only failed to do so in the face of the government's motion to disallow the testimony based on untimely notice, a due process violation of its own and ineffective assistance.

7. The district court determined that counsel's failure to object to the government calling Petitioner a liar fifteen (15) times during closing argument was strategic; however, counsel's affidavit was silent on this issue. This was a judicial determination without evidence and contrary to this Court's precedent.

The law in the Fourth Circuit is clear; the government is not permitted to refer to the defense witnesses as liars. *United States v. Moore*, 11 F.3d 475, 481 (4th Cir. 1993).[1] In *Moore*, the court of appeals suggested that calling a defendant a liar twice was too much and bordered on reversible error. Surely 15 times cannot be classified as proper. This alone should have remanded this case for a new trial. At the very least a hearing should have been held to determine why counsel failed to object during or after the 15 times the government disparaged the Petitioner in a manner forbidden by Circuit precedent. The conflict above triggers the intent of § 2255(b)'s requirement of a hearing to resolve the issue.

Other allegations sworn by Petitioner were met by no response in counsel's affidavit and, therefore, merit a hearing for credibility determinations. *See United States v. Ramirez*, 122 Fed. Appx. 14, 15 (4th Cir. 2005)(the district court ignored Petitioner's sworn statements and instead accepted the Government's unverified assertions which was error

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[1] In *Moore*, the prosecutor referred to one defendant as a liar once and the other as a liar twice, which this Court concluded "skirts the precipice of reversible error". 11 F.3d at 481. In 1993, when *Moore* was decided, twelve years before Petitioner's trial, this Court stated, "But once again--hopefully for the last time--the government is strongly admonished to 'clean up its act.'" *Moore*, 11 F.3d at 482, n. 9.

and required remand for a hearing). These other allegations involve sworn statements and evidence by both Petitioner and her attorney that are in conflict and, therefore, require a hearing. *See United States. v. Banks*, 166 F.3d 334, 1998 WL 808408, 3 (4th Cir.1998) ("Because the sworn evidence on this issue is conflicting, the district court should have conducted a hearing..."); *See also United States v. Stevens*, 129 F.3d 1261, 1997 WL 716228, *2 (4th Cir. 1997) ("The district court cannot prefer the lawyer's affidavit to Appellant's without a hearing"). (Emphasis added). The district court did not address a reason, if there was one, why the statute was not complied with. The lengthy decision denying the § 2255 petition does not meet the statutory requirements. The statute is clear – the court "shall" hold a hearing ""[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). No such finding occurred. Where the district court violates the plain meaning of a statute without specific findings of the exceptions that override that meaning, this Honorable Court should remand the case for compliance with the statute. A denial of the § 2255 petition, no matter how long the opinion, without finding the exception to the statute cannot overcome the plain meaning of its application.

Petitioner respectfully requests that this Honorable Court reverse the Fourth Circuit and remand her case to the district court for a hearing on her § 2255 petition in accordance with the Constitution and Appellate and well established Supreme Court precedent.

Respectfully submitted,

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# UNITED STATES COURT OF APPEALS
# FOR THE FOURTH CIRCUIT

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**No. 08-8255**
**(2:04-cr-01097-PMD-1)**

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**UNITED STATES OF AMERICA,**
**Plaintiff – Appellee,**

**v.**

**VICTORIA YAITSKY,**
**Defendant – Appellant.**

**filed April 17, 2009**
**[entered April 17, 2009]**

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## JUDGMENT

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In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 08-8255

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UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

VICTORIA YAITSKY,
Defendant - Appellant.

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Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, District Judge. (2:04-cr-01097-PMD)

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Submitted: April 8, 2009
Decided: April 17, 2009
[Entered April 17, 2009]

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Before WILKINSON and NIEMEYER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

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Dismissed by unpublished per curiam opinion.

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Marcia G. Shein, LAW OFFICE OF MARCIA G. SHEIN, PC, Decatur, Georgia, for Appellant. Alston Calhoun Badger, Jr., Assistant United States Attorney, Charleston, South Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit

PER CURIAM:

Victoria Yaitsky seeks to appeal the district court's order denying relief on her 28 U.S.C.A. § 2255 (West Supp. 2008) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Yaitsky has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

**UNITED STATES DISTRICT COURT**
**DISTRICT OF SOUTH CAROLINA**
**CHARLESTON DIVISION**

**Victoria Yaitsky,**
**Plaintiff**

**v.**

**United States of America**
**Defendant**

**Filed October 14, 2008**
**[Entered October 14, 2008]**

**JUDGMENT IN A CIVIL CASE**
**Case Number: 2:04-cr-1097-PMD**

**Decision on the Record.** This action came before the court of the record, Honorable Patrick Michael Duffy, District Judge presiding. The issues have been reviewed and a decision rendered.

**IT IS ORDERED AND ADJUDGED** that the Government's Motion for Summary Judgment is GRANTED. It is further ordered that Yaitsky's Motion to Vacate, Set Aside, or Correct Sentence is DENIED.

LARRY W. PROPES, Clerk

/s/ Melissa Newman
Deputy Clerk

October 14, 2008

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**CHARLESTON DIVISION**

**Victoria Yaitsky,**
**Petitioner,**

**v.**

**United States of America,**
**Respondent.**

**Filed August 18, 2008**
**[Entered August 18, 2008]**

## ORDER

This matter is before the court upon Petitioner Victoria Yaitsky' s ("Yaitsky" or "Petitioner") Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. For the following reasons, the court denies Yaitsky's motion and grants the Government's Motion for Summary Judgment.

## BACKGROUND

On December 8, 2004, a federal grand jury returned a one-count indictment charging Petitioner with murder-for-hire in violation of I 8 U.S.C. § I958(a). *(See* Indictment.) Yaitsky filed a Motion to Suppress on May 23, 2005, seeking an order of the court suppressing "the interception of certain tape recorded conversations that ... violate the prohibitions of 18 U.S.C. 2511 (2)(d) and 18 U.S.C. 2515." (Mot. to Suppress.) The court held a hearing on the Motion to Suppress on May 31, 2005, in which it denied the motion.

A jury trial was held on May 31, 2005, through June 3, 2005. During the course of trial, on June 2, 2005, the Government filed a Motion to Exclude Evidence, seeking an order of the court excluding Yaitsky's expert witness testimony as being in violation of Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure. The Government's motion states that on April 4, 2005, the day before jury selection was to be held, Yaitsky requested the trial be continued beyond the scheduled trial date of May 3, 2005, because she had retained an expert witness who was to render his opinion as to the authenticity of certain audio recording evidence. *(See* Mot. to Exclude at 1.) The court granted the continuance and set the trial date for May 31, 2005. The Government's Motion to Exclude indicates that Yaitsky's counsel never provided the written summary requested by the Government but that the court ordered Yaitsky to produce the expert for an interview with the Government's attorneys. *(Id.* at 2.) Although the interview took place on the evening of June 1, 2005, the Government indicates Yaitsky's attorneys "abruptly and profanely" announced they were leaving and taking their expert with them after only twenty minutes. *(Id.* at 3.) The motion further states,

> The expert maintained that the conclusion that he reached on April 7, 2005 with regard to the audio recordings has remained unchanged since that time. It was also apparent that the expert's testimony to be offered would be well-beyond the scope and content of the brief oral summary previously rendered by the Defendant's attorney. The expert informed the government for the first

> time that he had performed specific scientific experiments on the subject audio recordings. These experiments, in part, formed the basis of his ultimate opinion. Further, the expert stated he would testify that the methods employed by the FBI in reproducing the audio recordings were subject to criticism and impacted his opinion as to the authenticity of the recordings. The government had not in any manner whatsoever been previously advised that such would be a basis for the expert's opinion. When asked specifically about that basis for his opinion and its importance, the expert refused to answer the government's questions and replied "you can ask me that in court."

*(Id.* at 2-3.) The court heard argument on the motion, and Yaitsky's counsel "conceded that the motion should be granted." *(See* Pet. at 5.) The expert's testimony was thus not presented to the jury.

The jury returned a verdict of guilty on June 3, 2005, and Yaitsky's sentencing hearing was held on January 3, 2006. Petitioner was sentenced to a term of imprisonment of 120 months, and she was ordered to pay a special assessment fee of $100.00. Yaitsky filed a Notice of Appeal on January 19, 2006, and on appeal, she asserted the district court abused its discretion when it denied her Motion to Suppress audio recordings made by Igors Smolakovs. However, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court. Yaitsky filed the instant Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on November 21, 2007.

## STANDARD OF REVIEW

Yaitsky proceeds under 28 U.S.C. § 2255, which provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). On a motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255, the petitioner bears the burden of proving the grounds for collateral attack by a preponderance of the evidence. *Miller v. United States,* 261 F.2d 546, 547 (4th Cir. 1958). In deciding a § 2255 motion, the court need not hold a hearing if' the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The court has thoroughly reviewed the motion, files, and records in this case and finds that no hearing is necessary.

## ANALYSIS

Yaitsky lists fourteen grounds for relief in her § 2255 petition, and she has also attached a Memorandum in Support of her motion. The grounds and supporting facts are as follows:

**GROUND ONE:** Mrs. Yaitsky's trial counsel rendered ineffective assistance of counsel by failing to timely disclose a defense expert witness.

* * *

own use. only handing over to the FBI $10,000 of the original $20,000. (Trial Tr. vol. 2, 255-57, June 1,2005.) In addition, on cross-examination of the FBI Agent ("Agent"), Trial Counsel discussed the Agent's failure to pursue the whereabouts of the remaining S10.000. (Trial Tr. vol. 2. 315 17, June1.2005.) This court reiterates that Trial Counsel is not required to discuss every piece of evidence brought to its attention See *Byram,* 339 F.3d at 209; *Green,* 143 F.3d at 892. Although Trial Counsel did not bring up the last payment of 520,000 during his cross-examination of Smolakovs or the Agent, the record establishes that counsel's actions in discussing the $10,000 ",went to proving the same thing that discussion of the $20,000 could prove – Smolakovs' credibility.[15]

Notwithstanding the performance prong, Petitioner has not met the prejudice prong. Trial Counsel cross-examined Smolakovs on various issues relating to his credibility - pending federal charges, motives for testifying, and associations with other witnesses - with the jury present. (Trial Tr. vol. 2, 254 57, June 1, 2005.) There is no reasonable probability that, but for Trial Counsel not bringing up the additional $20,000 issue, that the outcome of

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[15] Trial Counsel brought up the final payment of $20,000 during his closing argument and used it as a reasonable inference that Igors scammed the FBI out of more than just the $10,000.

the case would have changed - the jury already heard a significant amount of evidence that cast doubt upon Smolakov's credibility. The court therefore concludes that Petitioner is not entitled to relief on this claim.

**L. Ground Eleven: Ineffective Assistance of Counsel for "recommending that Yaitsky testify in English."[16]**

Petitioner and Trial Counsel differ on why Petitioner testified in English. According to Trial Counsel, Petitioner decided prior to trial that she would testify in English. (Trial Counsel Aff. at 12.)

* * *

## CONCLUSION

It is therefore **ORDERED**, for the foregoing reasons, that the Government's Motion for Summary Judgment is **GRANTED**. It is further **ORDERED** that Yaitsky's Motion to Vacate, Set Aside, or Correct Sentence is **DENIED**.

**AND IT IS SO ORDERED.**

Patrick Michael Duffy
United States District Judge

**Charleston, South Carolina**
**August 17, 2008**

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[16] Ground Ten concerned Trial Counsel's failure to obtain and compare fingerprints from fraudulent letters. This contention was addressed under Ground Three.

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No. 06-4063**
**2:04-cr-1097-PMD**

**UNITED STATES OF AMERICA,**
**Plaintiff – Appellee,**

**v.**

**VICTORIA YAITSKY,**
**Defendant – Appellant.**

**JUDGMENT**

**FILED: August 30, 2006**
**[ENTERED: September 25, 2006]**

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Appeal from the United States District Court for the District of South Carolina at Charleston

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court. A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No. 06-4063**
**2:04-cr-1097-PMD**

**UNITED STATES OF AMERICA,**
**Plaintiff – Appellee,**

**v.**

**VICTORIA YAITSKY,**
**Defendant – Appellant.**

**[Entered: September 21, 2006]**

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## MANDATE

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The judgment of this Court, entered 8/30/06, takes effect this date. A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
CLERK

**UNPUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No. 06-4063**

**UNITED STATES OF AMERICA,**
**Plaintiff - Appellee,**

**versus**

**VICTORIA YAITSKY,**
**Defendant - Appellant.**

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**Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, District Judge. (2: 04-cr-1097-PMD)**

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**Submitted: August 4. 2006**
**Decided: August 30, 2006**
**Entered: August 30, 2006**

Before WILKINSON and NIEMEYER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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Daphne A. Burns, DAPHNE A. BURNS, L.L.C., Mount Pleasant, South Carolina; Michael P. O'Connell, STIRLING & O'CONNELL, P.A.,

Charleston, South Carolina, for Appellant. Reginald I. Lloyd, United States Attorney, Alston C. Badger, Assistant United States Attorney, Charleston, South Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM,

Victoria Yaitsky was convicted and sentenced to 120 months' imprisonment for knowingly and intentionally causing another to travel in interstate commerce with the intent to commit murder for hire. in violation of 18 U.S.C. § 1958(a) (2000). Yaitsky appeals. contending the district court abused its discretion when it denied her motion to suppress audio recordings that were surreptitiously made by Igors Smolakov5. who was employed by Yaitsky. In the tapes, Yaitsky discussed the murder for hire plot.

We review the admission of a tape recording for abuse of discretion. See United States v. Capers, 61 F.3d 1100, 1106 (4th Cir. 1995). The district court's determination that the proffered tape was made for a legitimate purpose is reviewed for clear error. See Traficant v. Commissioner, 884 F.2d 258, 266 (6th Cir. 1989). To withstand clear error analysis, the district court's determination of facts underlying the findings must be supported by a preponderance of the evidence. United States v. Crump, 120 F.3d 462, 468 (4th Cir. 1997). Yaitsky contends the district court denied her motion to suppress the audio tapes

in violation of the applicable federal statute, which states:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State.

18 U.S.C. § 2511 (2) ld) (2000).

Yaitsky contends Smolakovs and his associate made and turned over the recordings to the Government for a criminal or tortious purpose--namely. as part of a plot to "scam" Yaitsky and assume her business interests while she was incarcerated for the murder for hire plot. The district court rejected this argument in denying Yaitsky's suppression motion, finding it was speculative, as it was premised primarily on a single sentence contained in the summary of an FBI interview with Smolakovs.

In assessing the purpose of the interception, courts look to the intended use of the recording. In re High Fructose Corn Syrup Antitrust Litig., 216 F.3d 621, 626 (7th Cir. 2000). It is the intended use of the recordings that determines a violation of the Act, not whether the taping itself violates a state law. See id. at 625; Sussman v. American Broadcasting COS., 186 F.3d 1200, 1202-03 (9th Cir. 1999). We agree with the district court's finding that Smolakovs'

determinative purpose in recording the conversations was to document Yaitsky's plot and report it to the Government; any benefit to Smolakovs from Yaitsky's anticipated incarceration for her illegal conduct does not alter this conclusion. Thus, pursuant to § 2511(2)(d), his purpose for making the tapes was neither criminal nor tortious. See In re High Fructose Corn Syrup Antitrust Litig., 216 F.3d at 626 (citing cases holding that making recordings with a purpose of gathering evidence of a violation of law is not criminal or tortious).

Accordingly, we affirm the Judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

*United States District Court*
*District ofSouth Carolina*

**JUDGMENT IN A CRIMINAL CASE**
**(For Offenses Committed On or After November 1987)**

**UNITED STATES OF AMERICA**

**vs.**

**VICTORIA YAITSKY**

**Case Number: 2:04-1097 (1)**
**US Marshal's Number: 11869-171**
**DALE DUTREMBLE, ESQ,**
**MICHAEL O'CONNELL, ESQ**
**WILLIAM THROWER, ESQ,**
**Defendant's Attorney**

**Entered: January 10, 2006**

**THE DEFENDANT:**

[ ] pleaded guilty to count(s) on
[ ] pleaded nolo contendere to count(s) on which was accepted by the court.
[X] was found guilty on count(s) 1 OF THE INDICTMENT on JUNE 3, 2005 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

**Title & Section** - 18:1958(a)
**Nature of Offense** - Please see indictment
**Date Offense Concluded** - 10/8/04
**Count Number(s)** – 1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[ ] Count(s) D is Dare dismissed on the motion of the United States.

[ ] Forfeiture provision is hereby dismissed on motion of the United States Attorney.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court or United States attorney of any material change in the defendant's economic circumstances.

January 3, 2006

P MICHAEL DUFFY, US DISTRICT JUDGE

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred twenty (120) months and shall pay a $100.00 special assessment fee, due beginning immediately.

[X] The court makes the following recommendations to the Bureau of Prisons: The defendant be designated to the Women's Federal Correctional Institution either at Marianna, Florida or Coleman, Florida.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ]The defendant shall surrender to the United States Marshal for this district:

[ ] at a.m./p.m. on.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this Judgment as follows:

_____

_____

Defendant delivered on_____ to

_____at _____,

with a certified copy of this Judgment.

UNITED STATES MARSHAL

Deputy United States Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years. While on supervised release the defendant shall comply with the standard conditions of supervision as well as the following special condition: She shall participate in a program of mental health counseling and treatment as deemed necessary by the US Probation Officer until such time as she is released from the program by the US Probation Officer.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September* 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable)

[X] The defendant shall cooperate in the collection of DNA as directed by the Probation Office. (Check, if applicable)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the Probation Office. (Check, if applicable)

[ ] The defendant shall participate in an approved rehabilitation program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

**STANDARD CONDITIONS OF SUPERVISION**

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and

complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any

contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the "Clerk, U.S. District Court" unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of

payments set forth on Sheet 5, Part B.

**Assessment** - Totals: $ 100.00

[ ] The determination of restitution is deferred until An *Amended Judgment in a Criminal Case* will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed on the next page.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified in the priority order or percentage payment column on the next page. However, pursuant to 18 U.S.C. § 3664(8), all nonfederal victims must be paid in full prior to the United States receiving payment.

**SEE VICTIM(S) LIST ON THE NEXT PAGE**

[ ] If applicable, restitution amount ordered pursuant to plea agreement. . . . . .$.

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the D fine and/or D restitution.

[ ] The interest requirement for the D fine and/or [ ] restitution is modified as follows:

**Findings for the total amount oflosses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [x] Lump sum special assessment payment of $ 100.00 due beginning immediately.

[ ] not later than, or

[ ] in accordance with [ ]C, [ ]D, or [ ]E below; or

B [ ] Payments to begin immediately (may be combined with [ ]C, [ ]D, or [ ]E below); or

C [ ] Payments in (e.g., equal, weekly, monthly, quarterly) installments of $. over a period of (e.g., months or years), to commence after the date of this judgment; or

D [ ] Payments in (e.g., equal, weekly, monthly, quarterly) installments of$. over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant names and case numbers (including defendant number), total amount, joint and several amount, and corresponding payee, if applicable.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in property as directed in the Preliminary Order of Forfeiture, filed and the said order is incorporated herein as part of this judgment:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**No. 08-8255**
**(2:04-cr-01097-PMD-1)**

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**UNITED STATES OF AMERICA,**
**Plaintiff – Appellee,**

**v.**

**VICTORIA YAITSKY,**
**Defendant – Appellant.**

**Filed June 23, 2009**
**Entered: June 23, 2009**

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**Order**

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The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer and Senior Judge Hamilton.

For the Court.

/s/ Patricia S. Connor, Clerk